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IN THE
Supreme Court of the United States

October Term, 1947.

No.

J. GERBER HOOFNEL,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for a Writ of Certiorari to the United States
Circuit Court of Appeals for the Ninth Circuit.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

The undersigned on behalf of J. Gerber Hoofnel (and for other ex-employees of Lockheed Overseas Corporation similarly situated) prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in this case, numbered therein 11,593. By general agreement, the *Hoofnel* case and *Downs v. Commissioner* (No. 11,578 in the court below) were stipulated to be tried together in the Tax Court, and were argued together and disposed of in one opinion in the Circuit Court of Appeals, although they were therein separately briefed [R. 88] and separate judgments were therein rendered. [R. 101.]

Opinions Below.

The opinion and decision of the Tax Court finding for the Commissioner appears at 7 T. C. 1136 and at R. 58.

The opinion and Judgment of the United States Circuit Court of Appeals for the Ninth Circuit, 68 F. (2d) is published in full at R. 88 and 101. Two members of the Tax Court dissented on the second joint involved. [R. 62.]

Jurisdiction.

The judgment of the Ninth Circuit Court of Appeals was entered January 27, 1948, and no rehearing was invoked and this petition is presented within three months from the date of said judgment. Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended 43 Stat. 938 (28 U. S. C. A., par. 347a).

Questions Presented.

1. In the *Hoofnel* and *Downs* cases, so far as the tax on their 1943 overseas income is concerned, the facts are basically the same and present the same legal problems. To simplify these proceedings and avoid duplication, petitioner assumes it would please your Honorable Court that he abide in this case your decision in the *Downs* case regarding the tax on his 1943 overseas income, and, would ask that this Court consolidate the two cases for that reason, if that can be done.

2. The only question that remains for this Court's consideration is of secondary importance to the foregoing and may briefly be stated as follows:

3. Was an American citizen, a bona fide non-resident of the United States within the meaning of Section 116

(a)(1) of the Internal Revenue Code if he on June 30, 1942, boarded in New York harbor, a convoyed vessel of British registry with British officers under war and submarine conditions then prevailing?

Statement.

Section 116(a)(1) as it read in 1942, provided that there should be exempted from taxation, earned income from a source without the United States of an individual citizen of the United States, a bona fide non-resident of the United States for more than six months during the taxable year. [R. 59.]

Under contract of employment by Lockheed Overseas Corporation, J. Gerber Hoofnel embarked on June 30, 1942, on H. M. S. Maloja, a vessel of British registry, with British officers at New York Harbor. He was restricted to the boat and could not communicate with anyone from it. [R. 80.] This was on account of guarding against submarine danger. [R. 60.] It was stipulated that the vessel did not get out of New York Harbor until the morning of July 1, 1942. [R. 60.] His domestic salary was \$1420.59 for the first half of 1942, and \$2,600 was his overseas salary for the second half of 1942. [R. 9.]

As stated in the opinion of the Circuit Court, the *Downs* and *Hoofnel* cases were tried together before the Tax Court. [R. 88.]

According to the *Downs* Record, he also, on June 30, 1942, in New York Harbor boarded the *Orangi*, a transport of British registry with a British captain and officers. [Downs, R. 15.] The two transports were unquestionably in the same convoy.

Downs' testimony at the joint hearing, before the Tax Court, about the embarkation situation at New York and the sailing of the convoy is more vivid than that of Hoofnel:

Downs testified,

"Prior to embarking, we were instructed and were under restrictions about leaving the boat, or about communicating with any person. Early in the afternoon we all ate lunch and they took us into a large room with guards outside the door, and we were not to talk with anyone or use the telephones, and we stayed in that room and we were all told our instructions and why we were there. It was going to be a secret mission and they didn't want anyone to know about it. It was an Army colonel—an Air Force colonel, that told us about that, and from then on we were not able to communicate with anyone. We were immediately taken from that room and lined up, put in busses and taken to the boat, and put on it, and from then on we couldn't get off, and had to stay on the boat all together. We were going away on a war mission and it had to be kept a secret. We were down below decks. We never did get up on deck. We landed in Glasgow, Scotland, about fifteen days later, after being chased all over the ocean by submarines." [Downs, R. 83.]

It is interesting to note:

1. That while Downs apparently did not leave New York Harbor until after midnight of June 30, 1942, he was not taxed by the Commissioner on his overseas 1942 income. [Downs, R. 12.]

2. That two Judges of the Tax Court dissented and held that Hoofnel was not taxable on his 1942 overseas income. [R. 62.]

Reasons Relied on for Granting of the Writ.

1. The reasons given in part IV of the Downs petition fully cover the question as to tax on Hoofnel's overseas salary for the year 1943; this involves the conflict of the decision in the Ninth Circuit in the *Downs* and *Hoofnel* cases with that of the Fifth Circuit in *Swenson v. Thomas*, 164 F. (2d) 783. These reasons appear in part IV, subdivisions 1 to 5, inclusive, in the Downs petition.

2. The second and further reason why this writ should be granted is that in this case of *Hoofnel v. Commissioner* the Ninth Circuit has decided an important question of Federal law, which has not been, but should be, settled by this Court, namely:

Is an American citizen "outside of the United States" when he is aboard a vessel belonging to a foreign government about to sail in a secret convoy under war conditions such as prevailed June 30, 1942?

Wherefore, petitioner prays that a Writ of Certiorari be granted.

ROBERT A. WARING,
Attorney for Petitioner.

LAWRENCE M. CAHILL,
Of Counsel.

State of California, County of Los Angeles—ss.

Robert A. Waring, being first duly sworn, deposes and says that he is the attorney for the petitioner named¹ in the foregoing Petition for Writ of Certiorari; that he has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters, that he believes them to be true. Counsel further certifies that the petition is well founded, and is not interposed for delay.

ROBERT A. WARING.

Subscribed and sworn to before me this 23rd day of April, 1948.

MARGUERITE F. CRIPPS,

*Notary Public in and for the County of Los Angeles,
State of California.*

My commission expires January 3, 1952.

IN THE
Supreme Court of the United States

October Term, 1947

No.

MICHAEL DOWNS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.**

The brief just heretofore filed with your Honorable Court in *Downs vs. Commissioner* fully covers the question of the tax assessed against petitioner on his 1943 overseas salary.

As to whether Hoofnel was absent from the United States on embarking on the British transport in New York harbor on June 30, 1942, petitioner contends that the hazards of war should have been taken into consideration in this case. Vessels of the Allies leaving American ports did not dare reveal any detail of their departures because of the terrifying menace of the German submarine war-

fare. The ordinary rules of port were not being observed. Petitioner was to all intents and purposes completely under the jurisdiction of the British officers and they, under the necessary rules of the war, were independent in their actions.

In conclusion petitioner prays that this Writ may be granted.

Respectfully submitted,

ROBERT A. WARING,

Attorney for Petitioner.

LAWRENCE M. CAHILL,

Of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1947

No. 765

J. GERBER HOOFNEL, *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States
Circuit Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Tax Court (R. 49-62) is reported at 7 T. C. 1136. The opinion of the Circuit Court of Appeals (R. 88-100) is reported at 166 F. 2d 504.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 27, 1948. (R. 101.) The

petition for a writ of certiorari was filed on April 26, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Where the taxpayer boarded a British vessel anchored in New York harbor on June 30, 1942, but the ship did not sail for the British Isles until July 1, 1942, was the taxpayer, who remained in the British Isles from July until the end of the year 1942, a bona fide nonresident of the United States for more than six months of the year 1942 within the meaning of Section 116 (a) of the Internal Revenue Code prior to its amendment by Section 148 (a) of the Revenue Act of 1942?

2. Whether the taxpayer was a bona fide resident of a foreign country or countries during 1943 within the meaning of the applicable tax statute and regulations, so that his salary for 1943 is exempt from income tax.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and regulations are set out in the Appendix, *infra*, pp. 11-16.

STATEMENT

The facts as stipulated (R. 11-14) and as found by the Tax Court (R. 51-58) may be summarized as follows:

Early in 1942 Lockheed Aircraft Corporation entered into a contract with the United States Government in which the corporation agreed to organize, equip and operate an aircraft depot in Northern Ireland in connection with the war effort. In connection with the operation it was necessary for the Lockheed Aircraft Corporation (hereafter referred to as "Lockheed"), to employ large numbers of skilled men in the United States and transport them to the British Isles. (R. 52.)

From January 1 to June 30, 1942, taxpayer, a single man, was employed as a secretary by Vega Aircraft Corporation and by Lockheed at Burbank, California. During that time he received a salary amounting to \$1,418.59. (R. 51, 52.)

On February 18, 1942, taxpayer made out and signed a formal application for overseas employment with Lockheed and in connection with such application signed a contract shortly thereafter with the corporation in which he agreed to perform services for the company at an aircraft depot to be operated by it in the British Isles. In his application for foreign service, taxpayer indicated a willingness to serve as an employee of Lockheed overseas for more than two years, if necessary. The contract provided, *inter alia*, that the taxpayer's employment would commence when he reported for duty at the time and place in the United States designated by Lockheed, and would continue until November 1, 1942, or such later date as

might be agreed upon and thereafter until sixty days after return transportation to the United States was made available by Lockheed, it being understood that such return transportation would be made available on November 1, 1942, or the later date agreed upon or as soon thereafter as was practicable under the circumstances then existing; that during the time that taxpayer was employed and remained at the places of his duty outside of the United States, Lockheed would furnish or cause to be furnished, without cost to taxpayer, such adequate food, lodging, special clothing and equipment, medical, nursing, and hospital services and treatment and recreational facilities as circumstances would reasonably permit; that prior to departure and from time to time during his employment taxpayer would submit to such vaccination, inoculation, and/or any other medical, dental, surgical, nursing, and/or hospital treatment, preventative or curative, as Lockheed or other medical staff at the destination or elsewhere might from time to time specify, without expense to taxpayer; that Lockheed might direct the return to the United States of taxpayer, if in Lockheed's judgment taxpayer's health condition was unfavorable; that Lockheed would either pay or reimburse taxpayer for any and all taxes lawfully levied or assessed by any foreign government against taxpayer with respect to his residence, occupation, salary, or income, provided taxpayer complied with certain conditions. (R. 52-55.)

Pursuant to the terms of his contract, taxpayer on June 30, 1942, boarded the H. M. S. Maloja, a vessel of British registry and under a British captain and officers, berthed in New York harbor. Because of the danger of German submarines, taxpayer was not allowed any contacts with the mainland after he boarded the vessel. The Maloja, with taxpayer aboard, sailed from New York harbor early on the morning of July 1, 1942, bound for the British Isles. Taxpayer landed in Liverpool, England. (R. 55.)

Taxpayer was admitted to the British Isles on a visa as an employee of Lockheed. This visa, under British law, had to be used within three months from the date it was issued but the time that the holder would be allowed to stay was not mentioned therein. The visa, under British law, would permit taxpayer to remain for the purpose for which it was given, as an employee of Lockheed, and if and when Lockheed terminated its work over there, taxpayer was expected to depart within a reasonable time when transportation was available and subject to any extensions that might have been given him by the home office in London or local authorities in Belfast. (R. 55-56.)

After disembarking, taxpayer was first assigned to a small base near Glazebrook, England, for several weeks, after which he was transferred to the main base in Ireland. (R. 56.)

The expiration date of taxpayer's contract was extended by agreement of the parties until May 1, 1943, at which time he entered into a new contract with Lockheed. This new contract provided, *inter alia*, that the term of taxpayer's employment would continue for the duration of the contract between the Government and Lockheed as from time to time extended and for such period after the termination or completion of the contract as Lockheed might deem necessary for the winding up of the operations carried on under the contract after its termination or completion; and thereafter until return transportation to the United States for taxpayer was made available by Lockheed, which transportation Lockheed was to obtain as promptly as was practicable under the existing circumstances. (R. 56-57.)

The taxpayer remained in the employ of Lockheed stationed in Northern Ireland until July 13, 1944, when he returned to the United States. (R. 57.)

Taxpayer received as compensation for personal services rendered to Lockheed in the British Isles and Northern Ireland during the year 1942 the amount of \$2,600 and during 1943 the amount of \$5,262.50, of which amounts 90 per cent was deposited by the corporation to the account of the taxpayer with the Bowling Green Trust Company, Bowling Green, Kentucky, pursuant to Article 2 of his employment contract. (R. 57.)

Taxpayer did not at any time make an application to become a citizen of Northern Ireland, or a British subject. During the taxable year 1943 he was domiciled in the United States and his intentions were to remain in Ireland not longer than the duration of the war or until his employment with Lockheed terminated, at which time he intended to return to the United States. He did not pay any income taxes to the Government of Northern Ireland or to the United Kingdom of Great Britain. (R. 57-58.)

On these facts the Tax Court held (1) that the taxpayer was not a bona fide non-resident of the United States for more than six months during 1942 with the result that the amount received by him in 1942 as compensation for his services in the British Isles was not exempt from income tax under Section 116 (a) of the Internal Revenue Code. It held further, two judges dissenting without opinion, (2) that during the year 1943 the taxpayer was not a bona fide resident of a foreign country with the result that his compensation for that year was not exempt from income tax under Section 116 (a) of the Internal Revenue Code, as amended by Section 148 (a) of the Revenue Act of 1942. (R. 58-62.) The Circuit Court of Appeals affirmed. (R. 88-100.)

ARGUMENT

1. The decision of the Circuit Court of Appeals (R. 98-99) that the taxpayer was not physically absent from the United States for more than six months during 1942 and thus was not a bona fide nonresident of the United States for the period required by Section 116 (a) of the Internal Revenue Code prior to its amendment by Section 148 (a) of the Revenue Act of 1942 (Appendix, *infra*) is not asserted to be in conflict with any decision. Although, as taxpayer argues (Br. 7-8), he may have been under the jurisdiction of British officers when he boarded the British ship in New York harbour on June 30, 1942, he was not physically away from the United States on that date. Since Congress has predicated exemption from income tax on bona fide nonresidence, i.e., absence from the United States, for *more* than six months, the lower court correctly held that taxpayer's compensation for services performed abroad in 1942 was not exempt from tax. Cf. *Commissioner v. Fiske's Estate*, 128 F. 2d 487 (C. C. A. 7th), certiorari denied, 317 U. S. 635; *Commissioner v. Swent*, 155 F. 2d 513 (C. C. A. 4th), certiorari denied 329 U. S. 801; *Carstairs v. United States* (E. D. Pa.), decided January 15, 1936 (17 A. F. T. R. 1044); *Fichter v. Commissioner*, 9 T. C. 1126. Moreover, as the Circuit Court of Appeals observed (R. 99), the taxpayer's compensation for 1942 may well not be within the exemption granted by Section 116(a),

prior to amendment, since the original purpose of the exemption was to encourage the foreign trade of the United States,¹ and this taxpayer's employment, on a war project could not conceivably have served this purpose.

2. The second issue involving the taxability of the taxpayer's compensation for 1943 under Section 116 (a) of the Internal Revenue Code, as amended by Section 148 (a) of the Revenue Act of 1942 (Appendix, *infra*), and Section 29.211-2 of Treasury Regulations 111 (Appendix, *infra*) is the same, upon substantially similar facts,² as that presented in the petition for certiorari in *Michael Downs v. Commissioner*, No. 764, this Term, and the Court is respectfully referred to the arguments in our brief in opposition in that case.

¹ H. Rep. No. 1, 69th Cong., 1st Sess., p. 7 (1939-1 Cum. Bull. (Part 2) 315, 320); cf. S. Rep. No. 52, 69th Cong., 1st Sess., pp. 20-21 (1939-1 Cum. Bull. (Part 2) 332, 348); H. Conference Rep. No. 356, 69th Cong., 1st Sess., p. 33 (1939-1 Cum. Bull. (Part 2) 361, 364).

² The taxpayer was not married and was not shown to have maintained a house in the United States for his family during his absence from the United States as did Downs, but this fact does not change the result. Taxpayer at all times had a fixed intention to return to the United States upon the termination of his contract with Lockheed and during his stay abroad lived at air bases as a war worker in the accommodations furnished by his employer. He was merely one who was temporarily away from his home in the United States.

CONCLUSION

The judgment of the Circuit Court of Appeals is correct and does not conflict with any decision. The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

THERON LAMAR CAUDLE,
Assistant Attorney General.

SEWALL KEY,
LEE A. JACKSON,
HELEN GOODNER,
*Special Assistants to the
Attorney General.*

May, 1948.

APPENDIX**Internal Revenue Code:****SEC. 116. EXCLUSIONS FROM GROSS INCOME.**

In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) **EARNED INCOME FROM SOURCES WITHOUT UNITED STATES.**—In the case of an individual citizen of the United States, a bona fide nonresident of the United States for more than six months during the taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25 (a) if received from sources within the United States; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

* * *

(26 U. S. C. 1940 ed., Sec. 116)

SEC. 116. EXCLUSIONS FROM GROSS INCOME.

In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this chapter:

(a) [as amended by Section 148 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]

EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES.—

(1) FOREIGN RESIDENT FOR ENTIRE TAXABLE YEAR.—In the case of an individual citizen of the United States, who establishes to the satisfaction of the Commissioner that he is a bona fide resident of a foreign country or countries during the entire taxable year, amounts received from sources without the United States (except amounts paid by the United States or any agency thereof) if such amounts would constitute earned income as defined in section 25 (a) if received from sources within the United States; but such individuals shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection.

* * *

(26 U. S. C. 1940 ed., Supp. V, Sec. 116)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.116-1.³ EARNED INCOME FROM SOURCES WITHOUT THE UNITED STATES.—For taxable years beginning after December 31, 1942, there is excluded from gross income earned income in the case of an individual citizen of the United States provided the following conditions are met by the taxpayer claiming such

³ This regulation was amended by T. D. 5373, 1944 Cum. Bull. 143, 147, in respects not material here.

exclusion from his gross income: (a) It is established to the satisfaction of the Commissioner that the taxpayer has been a bona fide resident of a foreign country or countries throughout the entire taxable year; (b) such income is from sources without the United States; (c) the income constitutes earned income as defined in section 25 (a) if received from sources within the United States; and (d) such income does not represent amounts paid by the United States or any agency or instrumentality thereof. Hence, a citizen of the United States taking up residence without the United States in the course of the taxable year is not entitled to such exemption for such taxable year. However, once bona fide residence in a foreign country or countries has been established, temporary absence therefrom in the United States on vacation or business trips will not necessarily deprive such individual of his status as a bona fide resident of a foreign country. Whether the individual citizen of the United States is a bona fide resident of a foreign country shall be determined in general by the application of the principles of sections 29.211-2, 29.211-3, 29.211-4, and 29.211-5 relating to what constitutes residence or nonresidence, as the case may be, in the United States in the case of an alien individual.

* * *

SEC. 29.211-2. DEFINITION.—A “nonresident alien individual” means an individual—

(a) Whose residence is not within the United States; and

(b) Who is not a citizen of the United States.

The term includes a nonresident alien fiduciary.

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

* * *

SEC. 29.211-4. PROOF OF RESIDENCE OF ALIEN.
—The following rules of evidence shall govern in determining whether or not an alien within

the United States has acquired residence therein within the meaning of chapter 1. An alien, by reason of his alienage, is presumed to be a nonresident alien. Such presumption may be overcome—

(1) In the case of an alien who presents himself for determination of tax liability prior to departure for his native country, by (a) proof that the alien, at least six months prior to the date he so presents himself, has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien, at least six months prior to the date he so presents himself, has filed Form 1078 or its equivalent, or (c) proof of acts and statements of the alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident;

(2) In other cases by (a) proof that the alien has filed a declaration of his intention to become a citizen of the United States under the naturalization laws, (b) proof that the alien has filed Form 1078 or its equivalent, or (c) proof of acts and statements of an alien showing a definite intention to acquire residence in the United States or showing that his stay in the United States has been of such an extended nature as to constitute him a resident.

In any case in which an alien seeks to overcome the presumption of nonresidence under (1) (c) or (2) (c), if the internal-revenue of-

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ficer who examines the alien is in doubt as to the facts, such officer may, to assist him in determining the facts, require an affidavit or affidavits setting forth the facts relied upon, executed by some credible person or persons, other than the alien and members of his family, who have known the alien at least six months prior to the date of execution of the affidavit or affidavits.

